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No. 81-9

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF WASHINGTON, *et al.*,
Appellants,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,
Appellees.

On Appeal From The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION

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AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION

INTEREST OF *AMICUS CURIAE*

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board, and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education, to encourage the most efficient and effective governance and administration of the public schools, and to preserve the unique American tradition of local citizen control of schools, with education policy decisions rendered by those directly accountable to the public through the elective or appointive process. In its 41st year, National School Boards Association is the only major educational organization representing school boards and

their members. Its constituents are responsible for the education of more than 95 percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity, and educational productivity of the public schools within their jurisdictions. The National School Boards Association submits this brief in the belief that the issue of school desegregation continues to be one of the most pressing in this country. In light of today's economic climate, it is important that every child, regardless of race, color, or national origin, be provided with an equal chance in the public schools of this country. If this Court were to find the Initiative that is the subject of this case to be constitutional, that decision could lead to similar legislative actions and constitutional interpretations in other states. Such a decision could threaten the ability of the nation's public school boards to ensure by proper administrative means that education is provided to all students without regard to race, color, or national origin and in a climate of cooperation, not coercion.

ISSUE PRESENTED FOR REVIEW

May fundamental constitutional guarantees, upheld voluntarily by elected public officials, be constrained by a law — Initiative 350 — that prohibits the assignment of students to nonneighborhood schools for desegregation purposes?

ARGUMENT

Introduction

National School Boards Association agrees fully with the constitutional arguments made by appellee, Seattle School District, and incorporates by reference the arguments set forth in the brief filed herein by appellees. Because the constitutional issues are fully briefed by those appellees, *Amicus* will address

the broader and important policy questions presented by this case.

Since 1954, in the landmark case of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), hundreds of school districts have been *ordered* by courts to take action to desegregate their schools. In virtually every case, the action has been met with at least some adverse community reaction. On many occasions, the court has been left with no alternative but to develop a plan of its own. *See, e.g., Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971).

Citizens, courts, and the federal government have argued over the years that local school districts should be left to themselves to effect the management decisions that result in the desegregation of their schools. Who is in a better position than the locally selected and accountable school board to call in the members of the community to discuss an issue that affects all of the community? Who is in a better position to organize citizen involvement in developing alternative assignment plans? Who is in a better position to ensure that teachers and administrators are trained to deal with the myriad problems entailed in the development of an effective desegregation effort?

Most importantly, who better than the school board is in a position to ensure that the desegregation effort *works* and is not merely an antagonizing and futile exercise.

The real and troubling question contained in the legal arguments over Initiative 350 is whether fundamental constitutional guarantees, upheld voluntarily by elected public officials, may be constrained by state laws enacted in the heat of popular sentiment to limit traditional local discretion. Clearly, no such limit can be tolerated.

In sum, this now is the situation before this Court: A conscientious school board, recognizing an evil that demanded redress, sought to afford that redress, and did so without prodding of the courts. It now finds its effort thwarted by an initiative

that, from the start, was intended to destroy the voluntary desegregation plan — and its manifest advantages — and force the board to wait to be sued to redress the wrong it sought itself to remedy.

The Seattle school board, like most of its 16,000 or so counterparts in the United States, is not a perfect institution. Nevertheless, it took agressive action of its own volition to desegregate its schools.

Seattle's voluntary plan, drawn up after considerable consultation with citizens, community leaders, and interest groups, was less than perfect — a fact acknowledged candidly enough by the appellee itself. Yet this imperfect plan has ended racial imbalances in the community's public schools over the past four years and in the editorial view of the Seattle Times (March 16, 1981), it has "forestalled the threat of federal court intervention in local school district affairs." Moreover, the Seattle board, which sought to avoid the adverse consequences of court-ordered desegregation — perhaps taking a lesson from such contemporaries as the Boston School Committee — now finds itself being told by the State of Washington, and also by an inconsistent *federal* government, that it may not solve its problems by itself. Indeed, it must wait to be *sued* to do so. Only then — and presumably after years of wrenching community upheaval and expensive litigation diverting resources and attention from education, if modern history is to be a guide — will a plan be ordered by the courts. That such a proposition defies all logic is self-evident.

Voluntary Plans Work Better Than Mandated Plans

The Seattle school board directed its superintendent and staff to seek cooperation from all quarters in planning and implementing its voluntary desegregation effort. These administrators, in turn, worked closely with principals and teachers, among others. This network of cooperation, which has proved

successful in implementing many new programs in school districts because it encourages the active involvement of those most closely affected, may be expected to neutralize if not defeat the predictable efforts of those who organize to thwart a school district's desegregation plan. History in other communities has shown that this process, if not employed on behalf of equality, will be used *against* a desegregation plan.

Should the direct participants in the schools first be incited to work as a team *against* desegregation, which often happens when desegregation plans must be imposed by the courts, little chance remains that the team can be prompted to change sides to work effectively and willingly *for* successful desegregation. The foresight of the Seattle board in attempting to ensure a cooperative and voluntary desegregation plan and eliminate the need for judicial intervention now is rewarded by a posture of the State of Washington that says effectively that (1) a school system can be resegregated by popular will in defiance of civil rights statutes and Constitutional prerogatives and (2) that nothing *less* than a court order can desegregate the public schools in the state.

A statement to the Seattle Times of October, 1981, by the leader of the group that sponsored Initiative 350 belies appellant's contention that the referendum is racially neutral and not directed toward desegregation, and, in fact, argues that the will of the majority can override any Constitutional guarantee: "the people . . . have the right, through the ballot box, to express their judgment on desegregation, or for that matter, any similarly sensitive subject." Under such logic, couldn't slavery therefore be reviewed and presumably reinstated by popular referendum or universal suffrage discharged?

Equally preposterous is any contention that Seattle, or any other school district, is better off waiting to be sued before it acts to desegregate its schools. Should Initiative 350 be validated by the Court, the Seattle school board, once it *is* sued,

either will be forced to fight in court against that future plaintiff or to acquiesce and sign a consent agreement that would be made an order of the court. Should the latter alternative be chosen, it would allow no time for the gradual development of support for the desegregation effort, which already is under way in Seattle, and would aggravate the community strife that often accompanies court-ordered desegregation.

That such strife will follow *any* plan is probable. Evidence abounds that shows many parents oppose the transfer of their children from nearby schools for purposes of desegregation. *Amicus curiae* by no means asserts, therefore, that the Seattle voluntary desegregation plan was — nor is any school board's voluntary desegregation plan likely to be — "voluntary" on the part of parents. *Amicus* argues, rather, that a desegregation effort handled voluntarily and cooperatively, with the full participation of the local school board, administrators, teachers, and community leaders, is invested with the potent opportunity of ensuring that the community understands why the action is being taken and is given reason to believe that it has contributed to the plan and stands to lose if the plan fails.

Initiative 350 prohibits such voluntary action by the school board not only in situations where segregation is unintentional (and, thus, presumably exempt from a court order), but also extends its prohibition to *any* reassignment of pupils for desegregation purposes — *a crucial distinction and one misstated by the federal government in its brief.* In other words, the Initiative's prohibition applies even in cases wherein the school board concedes, publicly or privately, that the segregation was or might well have been caused intentionally by the actions of that board or a previous board. Consequently, Initiative 350 prohibits a school board from taking action to undo unlawful and unjust racial segregation *and* from heading off the lawsuit that inevitably will result from such injustice.

Failure To Take Local Action Invites Judicial Intervention

Initiative 350, far from ensuring that desegregation lawsuits will not be visited upon the school boards of the state of Washington, ensures that the courts *will* be called upon to redress grievances that might have been settled voluntarily, locally, and non-judicially. Surely both the State of Washington and the federal government know from recent history if not from common sense that, in a society such as ours, a grievance not resolved at a lower level will seek redress at a higher one, that a resolution will be imposed from above, and that the effect of that resolution will be more pervasive than would have been the case had the matter been settled at the lower level in the first place.

If local school boards in Topeka and elsewhere had not carried on *de jure* school segregation or had moved to correct it in the early fifties, what need would there have been for the *Brown* decision and its wrenching consequences?

If local school boards in Des Moines and elsewhere had acted to protect and promote the constitutionally guaranteed rights of Americans, rather than to curtail them, what need would there have been for the *Tinker*[1] decision and the severe restrictions it placed upon prerogatives of school boards?

If local school boards in Ohio and Arkansas and elsewhere had recognized that due process is a right not to be denied Americans, would there have been any need for the *Goss*[2] or *Wood*[3] decisions that place school board members and school administrators in danger of having to pay *personal* damages for violating the constitutional rights of their students?

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[1] Tinker v. Des Moines Comm. School Dist., 393 U.S. 503 (1969).

[2] Goss v. Lopez, 419 U.S. 565 (1975).

[3] Wood v. Strickland, 420 U.S. 308 (1975).

If local school boards everywhere had moved to eradicate sex discrimination from their school systems, what need would there have been for the federal government to impose Title IX regulations upon them?

The Seattle school board, seeking to avoid the errors of its counterparts, and hoping to obviate the consequent risk of profoundly pervasive judicial remedy, now finds itself thwarted and faced with having to wait to be haled into court.

As if the specter of such pervasive judicial remedy were not enough to establish the desirability of voluntary desegregation plans, then the need to gain the time afforded by voluntary plans ought to be. As the Court is well aware, the process of school desegregation involves a great deal more than merely moving students from school to school. In addition to the myriad technical details of the process, a vital need exists for preparation for the social phenomena of desegregation and especially for maintaining or improving the quality of education as desegregation occurs. Reassigned teachers need training in human relations and intercultural understanding. Many also need in-service training to improve their teaching skills. Some transferred students need remedial education. Curriculum revision, instructional materials, teacher aides, and guidance and counseling all might be needed to maintain the quality of education. And, of course, waiting in the wings of any desegregation effort is the potential villain — "white flight."

No sophisticated research is required to conclude that the complex task of desegregation can best be accomplished by a school board that has adopted a plan of its own and in which it has invested its own integrity. More importantly, a school board, with a minimum of disruption and reassignments, might avoid serious future segregation — if it identifies the problem early *and is free to act voluntarily to resolve it*. If a school board is forced, as Initiative 350 requires, to wait for a court order and the divisiveness resulting from lawsuits, the problem might no longer be soluble.

The Role Of The Federal Government

Originally, the federal government, through the Department of Justice, intervened in this case as a Plaintiff Intervenor on the side of the Seattle school board in its challenge to the constitutionality of Initiative 350. Recently, after a change in Administrations, the federal government has chosen to reverse its position and now has filed a brief arguing that Initiative 350 is constitutional.

Ironically, the Administration that has reversed the position of the federal government in the case, now having it favor Initiative 350, is the same that has been, and is, dramatically reducing the federal role in education by massive cuts in funding and by urging *voluntary, local solutions to problems besetting American society. See,* Address of the President to the New York Partnership, Incorporated Luncheon, January 14, 1982. The effect of the federal government's new position in this case is to ensure exactly the opposite. If Initiative 350 stands before this court, the local Seattle school board will be forced to wait for a federal court to enter an order *mandating* a desegregation plan. If the Initiative falls before this Court, the local Seattle board will be free to continue with its voluntarily adopted local plan. Effectively, the federal government, in its zeal to placate the opponents of busing at the risk of resegregating Seattle's schools, now is arguing for court-*ordered* desegregation.

This is a newly adopted position of the Executive. It flies in the face of the federal government's history of promoting voluntary, as opposed to forced, solutions — even as to "unintentional" segregation. Witness former President Nixon's message to Congress on May 21, 1970, in support of the Emergency School Assistance Act of 1970, which the Nixon Administration had designed to assist local school districts in desegregating their schools. Wrote Mr. Nixon:

> The educational effects of racial isolation, however, are not confined to those districts that previously operated

> dual systems. In most of our large cities, and in many smaller communities, housing patterns have produced racial separation in the schools which, in turn, has had an adverse effect on the education of the children. It is in the national interest that where such isolation exists, even though it is not of a kind that violates the law, we should do our best to assist the local school districts in attempting to overcome its effects.
>
> In some cases this can best be done by reducing or eliminating the isolation itself. . . . this Act deals specifically with problems which arise from racial separation, whether deliberate or not, and whether past or present. It is clear that racial isolation ordinarily has an adverse effect on education. Conversely, we also know that desegregation is vital to quality education — not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broad-based human understanding that increasingly is essential in today's world.

President Nixon's message then outlined specific provisions of the Act designed to assist local school districts in eliminating *de facto* as well as *de jure* segregation. Wrote the President:

> [O]ur goal is a system in which education throughout the nation is both equal and excellent, and in which barriers cease to exist. This does not mean imposing an arbitrary "racial balance" throughout the nation's school systems. But it should mean aiding and *encouraging voluntary efforts* by communities which seek to promote a greater degree of racial integration, and to undo the educational effects of racial isolation. (Emphasis supplied.)

The Emergency School Aid Act was passed by the Congress and, with revisions, has been extended to this date. 20 U.S.C. §§ 3191 *et seq.*

The Function Of Local School Boards

The federal government and the State of Washington argue that Washington — *unlike* other states — enjoys complete authority to enact whatever education policies it deems advisable. Initiative 350 is said to be merely an extension of that state

power and not an unusual departure from the norm. They argue that Washington is "unique" because its state legislature and state department of education have control of the education policies of local school boards.

However, the unusual characteristic of Washington, if any, does not relate to policy-making. As a result of school funding decisions, the legislature passed a school financing statute which was intended to result in the bulk of the funding for "basic education" to be taken over by the state through a state-wide formula of block grants. The law also included a 10% lid on the amount of property taxes which could be levied by a school district. Were the original concept of that legislation to have been implemented, at least the school financing system in Washington could have been said to be "unique."

But — state funding for education amounts to only 55% and each year the legislature lifts the lid on local levies to allow school districts to make up the difference. Therefore, in practice even the financing of school districts in Washington is not unique.

Further, like the rest of the 50 states, save Hawaii, education policy-making in Washington is reserved to the local school districts.

Even the school financing statute, Washington Basic Education Act, Ch. 359, 1977 Wash. Laws, 1st Ex. Sess., *amended by* ch. 250, 1979 Wash. Laws., 1st Ex. Sess., which amounts to a mere fraction of Washington school legislation, was passed with great deference to local control, as a few excerpts from the legislative history will show:

> Senator Bottiger: "Would Senator McDermott yield to another question? Senator McDermott, I sent you the materials on the plan used by the Franklin-Pierce school district of interims and programs of that nature and asked you whether this bill would prevent a school district from

using that kind of innovative program. They have one month a year where the children are offered two courses which they take intensive study. In other words, in the morning they take one class; in the afternoon they take another. Is that kind of program prohibited by this bill?

Senator McDermott [Chairman of Senate's Education Committee; floor leader for the Basic Education Act in the Senate]: "Senator Bottiger, *we have tried to write a bill that was flexible for the local districts to make any program that made sense to them for their children.*"

"In addition, this bill does not have an effective date until the first of September, 1978, which means that Superintendent Brouillet will have time to do a survey to find out if there is any district in the state where we have precluded them from any kind of innovative program. The reason of setting the effective date at that point was to give us time to make sure that *we haven't in any way taken away local control of how the hours are distributed or how the programs are offered in the local school districts.* So, there is no intention to bind the hands of any district like Franklin-Pierce that has really a very excellent program in area work skills."

Journal of the Senate, 45th Wash. Leg., Vol. I, at 1184 (April 21, 1977) (emphasis added).

Senator McDermott (responding to point of inquiry: "Senator Clarke raises the question of whether or not we are saying that there must be a one to twenty ratio of teachers to students in the classroom. That is not the intention of this provision. It is merely to say we will provide enough money for fifty teachers, certified people, for every one thousand children. *We left to the local district the decision as to whether that means forty teachers in the classroom, or forty-five, or thirty-five and the rest administrators. That kind of decision we felt was best left at the local level.*

Id. at 1185-86 (emphasis added).

> Senator Mardesich: "Would Senator McDermott yield to a question? Senator McDermott, on page 8, section 5, line 29 of the bill, there is language reading, 'PROVIDED, That by the third year following the effective date of this 1977 amendatory act, the ratios included in the formula shall reflect not less than fifty certificated personnel to one thousand students and one classified personnel to three certified personnel.' *Is it the intent of that language, as incorporated by the committee, and in the bill now on the floor, in any way mandate that class size as related to that ratio, whether for the funding of that basic education or all education in either event?* Could I have a 'yes' or 'no', please?
>
> Senator McDermott: "The answer to your question is 'no'."

Id. at 1186 (emphasis added).

> Senator Grant: "Would Senator McDermott yield? Senator McDermott, I am looking at page 5, the definition of compensation. I see that you have defined it as one hundred and seven percent of the average salary of a certificated and one hundred and fourteen percent of the average salary for classified personnel. Now, how did you arrive at that seven and fourteen percent figure? What is included? Exactly what is included as far as benefits in that seven and fourteen percent?
>
> Senator McDermott: "Senator Grant, there are several ways to define something. One way is to be specific about it and another way is to leave local control and put out a specific amount of money and *let the local districts use that money for a benefit package of their choosing. Historically in this state, the benefit package has been decided at the local level,* and we chose to define compensation as the amount of money that is presently in the budget and has been historically in the budget; that is, seven percent for certified people and fourteen percent for the classified people. *There is a great diversity of benefit packages out in*

the districts and it is impossible to say what every district uses that money for.

* * * *

Senator Grant: ". . . *So what about health insurance and dental plans?*"

Senator McDermott: "*That sort of thing differs from district to district. It certainly is included in various districts. Senator Grant, the money could be used for any kind of health and welfare kind of program. We do not specify, we never have specified, we have always given the money to the districts and let them do as they choose.*

Id., Vol. II, at 2871-72 (June 19, 1977) (emphasis added).

The constitutions of all 50 states provide for the *potential* power of state legislatures and state departments of education to render decisions pertaining to the educational endeavors of the local school districts. Only the state of Hawaii has chosen to operate under a single statewide school district. The remaining 49 states divide their states into local school districts, with boundaries that may be changed by the state. Furthermore, *every* state legislature (that of the State of Washington included) reserves *potential* power to render even the most minute decisions regarding the operation and management of local public schools, decisions pertaining to building assignments for students, teacher assignments, school closings, and the like. That such power rarely is exercised at the state level — save for the promulgation of general policies and guidelines — is the result of common sense and historical precedent. Longstanding experience demonstrates that decisions such as these are best rendered at the local level.

The American tradition of *local citizen* control of public education dates back to the Colonial days. In 1647, the Massachusetts Bay Colony required larger towns to create and maintain schools. The colonists themselves decided all school-related matters at the town meeting.

With the ratification of the United States Constitution, all legal responsibilities of public education effectively were left to the states, not to the federal government. The powers of providing free and compulsory education in elementary and secondary schools are delegated by 49 of the 50 states to *local school boards*. That has been the case in Washington since it was a territory.

The structure of the educational system in Washington parallels the general pattern of organization found in most other states. The appendix illustrates this by comparing Washington laws to those in a number of her sister states, including those which this Court has labelled as reflecting state control. *E.g.*, *Milliken* v. *Bradley (I)*, 418 U.S. 717 (1974) (Michigan); *Swann* v. *Charlotte-Mechlenburg Board of Education*, 402 U.S. 1 (1971) (North Carolina); *Brown* v. *Board of Education, (II)*, 349 U.S. 294 (1955) (Delaware, Kansas, South Carolina, and Virginia).

Each state, including Washington, divides the power to educate among a state board of education, a state superintendent, and local boards of education. Washington and Arizona are unique among the states specifically examined because the *local* boards are expressly included in a general statute that divides the educational authority. The Washington statute provides that "[t]he administration of the public school system shall be entrusted *to such state and local officials, boards, and committees* as the state constitution and the laws of the state shall provide." *Wash. Rev. Code* 28A.02.020 (emphasis added). Thus, Washington law envisions that the local boards of education shall have the power to deal with local matters, at least as far as other more specific statutes provide.

The specific powers of local boards in Washington are defined in *Wash. Rev. Code* 28A.58 and 28A.59. Like many other states, Washington reserves the possibility of limits on a local

board's latitude and discretion. However, initial control of local educational concerns is with the local boards in Washington, and in practice effective control remains at the local level.

It is difficult to generalize as to whether a specific area is within local control or state control as no state grants absolute power to its local boards. In each of these states, the state board or the legislature retains a general supervisory power and the power to determine general policy and goals. Even in Illinois, where the local boards have considerable power, the legislature often regulates by law specific areas that otherwise would be considered within the realm of the local boards.[4] *E.g., Ill. Rev. Stat.* § 11-1414 (Cum. Supp. 1981) (regulates the flashing light warning system on school buses and the method for loading and unloading students).

Before Initiative 350 was passed, it was beyond dispute that local school districts in Washington were solely responsible for creating and revising intradistrict attendance zones, regardless of the policies guiding such decisions. For example, in *State ex rel. Citizens Against Mandatory Busing* v. *Brooks*, 80 Wn.2d 121, 492 P.2d 536 (1972), the Washington Supreme Court held that plaintiffs' request for a recall election due to their dissatisfaction with the Seattle board's first mandatory busing plan would not be proper because the members of the board were acting within their lawful discretion. Further in *Citizens Against Mandatory Busing* v. *Palmason*, 80 Wn.2d 445, 495 P.2d 657 (1972), the state supreme court overturned a lower court's injunction against implementation of the mandatory busing plan in Seattle. After careful analysis, the supreme court concluded that the local board had the requisite power and acted properly in devising the plan. Thus, regardless of any formal

[4] Ironically, in Illinois the state legislature and the state board of education have imposed a duty on local boards to consider the elimination of segregation in creating or revising attendance units. Ill. Rev. Stat. § 10.21.3.

reservation of state power to supervise local boards of education, which is true in all states, local boards in Washington *in fact* and in practice were responsible for student assignment and for devising and implementing desegregation plans within their districts. Consequently, the Court of Appeals was quite correct when it spoke of "a state-wide majority *** usurp[ing] *traditional* local authority over school board educational policies." 633 F.2d at 1344 (emphasis added).

CONCLUSION

If control over education is to be retained at its most effective level, final decision making must stay with representative school boards. *Through school boards, taxpayers are assured of a direct channel for influencing school policy.*

Genuine involvement of teachers, students, parents, and civic groups in the development of school district policy is the best way to ensure harmony within the community and to gain broad-based support for decisions made. But it properly remains the school board's function to assess the opinions of the various interest groups, and then to establish the policies and programs which in the board's best judgment meet the unique needs of the children.

On January 14 the President of the United States addressed the New York Partnership, Incorporated luncheon in New York City on the subject of voluntary action to resolve local problems in the community. Mr. Reagan's remarks belie the position taken by his Administration in this case.

> The key to rebuilding communities is individual initiative, leadership, personal responsibility . . .
>
> Only when the human spirit is allowed to invent and create, only when individuals are given a personal stake in deciding their destiny, in benefitting from their own risks, only then can society remain alive, prosperous, progressive and free . . .

> We want to see community partnerships between the private and public sector in every community in America . . .
>
> Community groups are part and parcel of our national heritage. They respond to our desire for cooperation, sympathy, teamwork and brotherhood. They help to shape our lives. They are close to the problems we face and they can best find the solutions we seek.

School desegration is one of the most important issues for communities and school boards. The solutions to the problems created by segregation are difficult enough if school boards take them on voluntarily in a general positive spirit. If voluntary desegregation is foreclosed to local school boards, those problems will be increased a hundredfold. The National School Boards Association urges this Court to preserve for local school boards the tools to assure equal opportunity. Not all school districts have the foresight and courage to do what the Seattle school district did in this case. But — where school boards take on the task of voluntarily desegregating their schools, the public and the courts owe a moral and constitutional duty to those boards to support their efforts.

Respectfully submitted,

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